

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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TERRANCE L. LAVOLL,

Petitioner,

Case No. 2:19-cv-02249-GMN-EJY

ORDER

v.

JERRY HOWELL, et al.,

Respondents.

28 U.S.C. § 2254 habeas petitioner Terrance L. Lavoll moves for a stay and abeyance of his petition while he returns to state court to exhaust one claim. (ECF No. 38.) Respondents oppose, and Lavoll replied. (ECF Nos. 39, 40.) The court is persuaded that a stay is warranted, and therefore, grants the motion.

**I. Background**

**a. State Court Proceedings**

In October 1997, a jury convicted Lavoll of count 1: sexual assault of a minor under 16, 2 counts of sexual assault of a minor under 16 with a deadly weapon; and solicitation of minor to engage in acts constituting crimes against nature. (Exhibit 16).<sup>1</sup> The state district court sentenced Lavoll to what amounts to three consecutive terms of life with the possibility of parole. (Exh. 21.)

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<sup>1</sup> Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 19, and are found at ECF Nos. 20-22.

1       The Nevada Supreme Court affirmed Lavoll's convictions in April 2000 and  
2 affirmed the denial of his state postconviction habeas corpus petition in November  
3 2007. (Exhs. 52, 99). In November 2010, this court denied Lavoll's first federal habeas  
4 petition on the merits. Case No. 2:08-cv-00011-PMP (ECF No. 42).

5       In July 2012, an amended judgment of conviction was entered that added a  
6 special sentence of lifetime supervision to commence upon release from any term of  
7 imprisonment, probation, or parole. (Exh. 101.) Almost six years later, in March 2018,  
8 Lavoll filed a second state postconviction petition. (Exh. 103.) The state district court  
9 denied it based on multiple procedural bars, and the Nevada Court of Appeals affirmed  
10 the denial of the petition as untimely and successive. (Exhs. 114, 123.)

11                  **b. Federal Court Proceedings**

12       Lavoll dispatched his federal habeas corpus petition for filing on November 26,  
13 2019. (ECF No. 1). This court granted his motion for appointment of counsel, and he  
14 filed an amended petition through counsel. (ECF Nos. 12, 17). In January 2022, the  
15 court granted respondents' motion to dismiss in part, dismissing grounds 3 and 4 as  
16 procedurally barred, concluding that ground 1 was unexhausted, and deferring a  
17 decision on ground 2. (ECF No. 34.)

18                  **II. Motion for Stay**

19       Lavoll now moves for a stay and abeyance to return to state court to exhaust  
20 ground 1. (ECF No. 38.) In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court  
21 placed limitations upon the discretion of the court to facilitate habeas petitioners' return  
22 to state court to exhaust claims. First, "stay and abeyance should be available only in  
23 limited circumstances." *Rhines*, 544 U.S. at 277. And the relief is "is only appropriate  
24 when the district court determines there was good cause for the petitioner's failure to  
25 exhaust his claims first in state court. *Id.* However, "it likely would be an abuse of  
26 discretion for a district court to deny a stay and to dismiss a mixed petition if the  
27 petitioner had good cause for his failure to exhaust, his unexhausted claims are  
28 potentially meritorious, and there is no indication that the petitioner engaged in

1 intentionally dilatory litigation tactics." *Id.* at 278; see also *Gonzalez v. Wong*, 667 F.3d  
 2 965, 977–80 (9<sup>th</sup> Cir. 2011).

3 "[G]ood cause turns on whether the petitioner can set forth a reasonable excuse,  
 4 supported by sufficient evidence, to justify [the failure to exhaust a claim in state court]." *Blake v. Baker*, 745 F.3d 977, 982 (9<sup>th</sup> Cir. 2014). "While a bald assertion cannot  
 5 amount to a showing of good cause, a reasonable excuse, supported by evidence to  
 6 justify a petitioner's failure to exhaust, will." *Id.* An indication that the standard is not  
 7 particularly stringent can be found in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), where  
 8 the Supreme Court stated that: "[a] petitioner's reasonable confusion about whether a  
 9 state filing would be timely will ordinarily constitute 'good cause' to excuse his failure to  
 10 exhaust." *Pace*, 544 U.S. at 416 (citing *Rhines*, 544 U.S. at 278). See also *Jackson v.*  
 11 *Roe*, 425 F.3d 654, 661-62 (9<sup>th</sup> Cir. 2005) (the application of an "extraordinary  
 12 circumstances" standard does not comport with the "good cause" standard prescribed  
 13 by *Rhines*).

15 As ground 1, Lavoll alleges that he was denied the right to choose whether to  
 16 concede guilt at trial in violation of his right to choose the objective of the defense under  
 17 the Sixth and Fourteenth Amendments. (ECF No. 17 at 7-10.) He argues that his  
 18 counsel conceded during closing arguments that Lavoll was guilty of a lesser offense  
 19 though Lavoll never agreed to this concession.

20 Lavoll relies on *McCoy v. Louisiana*, wherein the Supreme Court held that  
 21 defense counsel's concession of guilt, when the accused wished to maintain his  
 22 innocence, violated the accused's Sixth Amendment right to choose the objective of the  
 23 defense. 138 S.Ct. 1500 (2018). In *McCoy* the Court explained that "[b]ecause a client's  
 24 autonomy, not counsel's competence, is in issue, we do not apply our ineffective-  
 25 assistance-of-counsel jurisprudence, *Strickland v. Washington*, 466 U.S. 668 (1984), or  
 26 *United States v. Chronic*, 466 U.S. 648 (1984) . . ." *Id.* at 1510-1511.

27 Lavoll points out that *McCoy* was decided in May 2018, while his state petition  
 28 was pending and one month before the state district court denied the petition. (ECF No.

1 38 at 5.) He argues that his state claim was based on the same factual and legal  
2 allegations as the federal claim, that it “contain[ed] some important elements of a  
3 McCoy claim,” and that, at the very least, he was reasonably confused as to whether a  
4 McCoy claim was exhausted. *Id.*

5       Opposing the motion, respondents assert that Lavoll’s argument that he believed  
6 he exhausted his claim could theoretically apply to every *pro se* petitioner. (ECF No. 39  
7 at 3.) They also contend that when Lavoll opposed respondents’ motion to dismiss, he  
8 took the position that he no longer had an available state-court forum to present ground  
9 1 due to Nevada’s mandatory procedural bars. (ECF No. 25 at 20-21.) This is incorrect:  
10 Lavoll argued that ground 1 was exhausted, but this court disagreed. (*Id.* at 20; ECF No.  
11 34 at 6-7.) Respondents also contend that ground 1 has no likelihood of success. (ECF  
12 No. 39 at 4.) They argue that Lavoll fails to point to anywhere in the state-court record  
13 where his counsel conceded to lesser charges over Lavoll’s objection. They point out  
14 that counsel’s concession during closing argument was to uncharged offenses and  
15 insist that Lavoll has no likelihood of success on the merits.

16       The court agrees with Lavoll that the proper inquiry here, however, is whether the  
17 claim is plainly meritless. The court concludes that Lavoll has met the not-particularly-  
18 strict bar of demonstrating that good cause exists and that the claim is not plainly  
19 meritless. Further, there is no credible indication of intentionally dilatory litigation tactics.  
20 Accordingly, the court grants the motion for stay. Lavoll will need to file a motion to re-  
21 open the case after his state proceedings have concluded.

22           **III. Conclusion**

23       **IT IS THEREFORE ORDERED** that petitioner’s motion for stay and abeyance  
24 (ECF No. 38) is **GRANTED**.

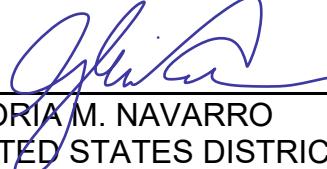
25       **IT IS FURTHER ORDERED** that this action is **STAYED** pending final resolution  
26 of petitioner’s state proceedings.

27       **IT IS FURTHER ORDERED** that the grant of a stay is conditioned upon petitioner  
28 returning to federal court with a motion to reopen the case within **45 days** of the

1 issuance of the remittitur by the state appellate court at the conclusion of state-court  
2 proceedings.

3 **IT IS FURTHER ORDERED** that the Clerk of Court **ADMINISTRATIVELY**  
4 **CLOSE** this action, until such time as the court grants a motion to reopen the matter.

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6 DATED: 18 October 2022.  
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GLORIA M. NAVARRO  
UNITED STATES DISTRICT JUDGE

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